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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 753

JULIUS H. MINER, as Judge of the Circuit Court of Cook County, and PAUL WILLER PETERSEN,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel., BENEFIT ASSOCIATION OF RAILWAY EMPLOYEES, a mutual insurance corporation, organized and existing under and by virtue of the laws of the State of Illinois, EARL T. DEMOE, ARTHUR J. LINDSLEY, JAMES M. STREET, FRED B. AHARA, ANDREW BLOOMFIELD, W. H. FUNKE, LEE F. WARD and PAUL E. KELLER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

REPLY OF PETITIONERS TO BRIEF OPPOSING CERTIORARI.

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ARGUMENT.

A.

The federal question was presented in apt time.

Respondents contend that the Iilinois Court did not decide the federal question involved, with which conten-

tion petitioners are in accord. Respondents further contend that the Illinois Court could properly have ignored the federal question on the theory that it was waived by petitioners, not having been argued but merely mentioned in passing. The record does not support this contention in any respect whatsoever.

Petitioners' answer to respondents' petition for rehearing stated: "It could well be said by respondent Petersen that the granting of a writ of mandamus in this case would be directly contrary to that decision as it would be depriving the stockholders of the corporation of their only remedy for the enforcement of the corporate right to an accounting from these directors, leaving no opportunity to protect it, for the directors themselves will not act," citing *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673 (R. 89). In such answer it was further alleged: "To issue the writ of mandamus would deprive Petersen of his right and remedy in contravention of the Fourteenth Amendment while the refusal to issue the writ could not deprive its directors of due process of law". (R. 91). Such allegation necessarily presented a question under the Federal Constitution in which the "due process" clause is contained in the Fourteenth Amendment and not one under the Illinois Constitution in which the "due process" clause is contained in Section 2 of Article II.

In petitioners' petition for rehearing it was stated: "We do not believe that it was the intent of this Court to produce such a result which denies respondent Petersen a hearing on whether, (conceding that his suit might be within the scope of Section 201) as a matter of fact, its successful prosecution would or would not interfere with the prosecution of the company's business for to do so would be to deprive him of property without due process of law (*Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673)." (R. 113, 114)

From the foregoing quotations it appears that petitioners not only specified the federal question involved and the Constitutional provision relied upon, but the question was argued by petitioners who presented authority in support of their argument. Under such circumstances it should not have been ignored by the Illinois Court, nor can it be contended that that Court would have been required to conduct an independent investigation into the record or the law to find the basis of the federal question or its merit, as was the situation in *Duggan* v. *Ryan*, 211 Ill. 133.

Equally without foundation is the contention that it was waived by petitioners, as was the situation in *Harding* v. *Illinois*, 196 U. S. 78, in which case the state court specially found such waiver to exist.

The rule of law here applicable is that where the state court fails or refuses to pass upon an asserted federal Constitutional right, the case is reviewable by this Court if the state court judgment necessarily denied the federal right asserted. *C. B. & Q. R. R. Co.* v. *Chicago*, 166 U. S. 226, 232.

This Court did not hold in *Herndon* v. *Georgia*, 295 U. S. 441, nor has it ever held, that a state court can prevent this Court from determining whether asserted federal rights have been denied a litigant, by ignoring or refusing to pass upon the right asserted. To the contrary, this Court has held (cases cited pages 25, 26 of Petition for Writ of Certiorari) that the Constitution insures to the citizen the privilege of having his rights and immunities judicially declared and protected as well as guaranteeing to him the rights and immunities themselves.

Petitioners believe that their original petition sufficiently states the grounds and the authorities disclosing that the federal question was presented by them in apt time, in view of the prior decisions of the Illinois Court construing

the statute here involved, the construction placed upon it by the opinion of the Illinois Court sought to be reviewed, as a result of which the statute is construed to mean one thing for some cases and another thing for others, and the fact that petitioner Petersen had, initially, invoked a reasonable construction of that statute in his own behalf.

B.

Petitioners were denied due process.

It is admitted by respondents that in the mandamus action before the Illinois Court, the only record before that Court was petitioner Petersen's original complaint filed in the Circuit Court of Cook County (R. 10-16). The Chief Justice of the Supreme Court of Illinois himself stated that that and that alone would be considered by that Court and that that Court had no means for trying issues of fact (R. 72-74). Nevertheless the Illinois Court determined, in that mandamus action, that Petersen's derivative action would interfere with the prosecution of the business of the respondent insurance company.

Respondents argue at length that petitioner Petersen was not denied due process because he was afforded a hearing by the Illinois Supreme Court upon the pleadings, as construed by that Court. Petitioner Petersen's answer to respondents' petition for mandamus set up issues of fact and, specifically, the issue of fact that the prosecution of his derivative action would not interfere with the prosecution of the Association's business (R. 52-53). This answer was treated as a demurrer by that Court and the reasons for that ruling were given in the letter of the Chief Justice (R. 72-74) as being the lack of facilities of the Court to try issues of fact.

Even though it is true that a hearing was granted Petersen in the mandamus suit on the questions of law involved,

he was not permitted to present evidence on the factual question of whether his suit would interfere with the prosecution of the Association's business. This Court has held that even though a trial according to the modes of procedure applicable is afforded, still that is not, in itself, sufficient to afford due process, for the judicial authorities of a state may keep within the letter of the procedural requirements and give the parties the fullest opportunity to be heard (which was not given here) and yet its final action might be such as to be inconsistent with the Fourteenth Amendment. *C. B. & Q. R. R. Co.* v. *Chicago,* 166 U. S. 226, 234, 235.

In its first opinion the Illinois Supreme Court, itself, recognized that under the allegations of petitioner Petersen's complaint it would necessarily be a question of fact as to whether any orders entered, or which could be entered pursuant to his complaint, constituted an interference with the prosecution of the business of the respondent Association (R. 81).

To say that in its second opinion the Illinois Supreme Court found, *as a matter of law,* that *any* relief which could be granted pursuant to that complaint would constitute an interference with the prosecution of the business of the respondent Association is, at best, but a play upon words. Whether the removal of the respondent directors and the election of new ones would interfere with the prosecution of that business any more than would the election of new directors at the expiration of the present term, is a factual question. Whether the sending of notices of a special meeting of members for the election of directors constitutes such interference is likewise a question of fact. It is equally a question of fact whether such interference would result from terminating the contract whereby certain individuals are designated as agents of the corporation, when, in fact, such persons are not licensed to act as agents

and therefore are not legally capable of producing any business whatsoever for the company.

The Illinois Supreme Court, in the mandamus proceeding, determined all those questions by granting the writ of mandamus without affording an opportunity to petitioner Petersen to present evidence on those questions and without itself having any means of determining such issues. Petitioner Petersen was thereby deprived of due process of law, for as this Court has said in *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U. S. 292, 304, and in *West Ohio Gas Company* v. *Public Utilities Commission,* 294 U. S. 63, 69, a hearing is not judicial, at least in any adequate sense, unless the evidence can be known and considered. The right to such a hearing is assured to every litigant by the Fourteenth Amendment as a minimal requirement. *West Ohio Gas Co.* v. *Public Utilities Commission,* 294 U. S. 63, 69. *Brinkerhoff-Faris Co.* v. *Hill,* 281 U. S. 673, 682.

But even if it be conceded, solely for purposes of argument, that each and every of the foregoing types of relief which could be granted under Petersen's complaint, would constitute, *as a matter of law,* an interference with the prosecution of the respondent Association's business, still there was within its scope a decree limited to a direction to the individual respondents to account to the Company for the unconscionable payments made to them pursuant to the Agency contract. Could such a decree, so limited, constitute, *as a matter of law,* an interference with the prosecution of the Company's business?

Respondents contend that the Illinois legislature could constitutionally have deprived a member of an insurance company of his derivative action in equity provided that some other effective remedy was provided. With this contention we do not quarrel, but the legislature, in the exercise of its police power, did not see fit to adopt that course. The legislature, in the exercise of that power

and in the public interest, enacted Section 201 of the Illinois Insurance Code (1943 Ill. Rev. Stats. Cha. 73, par. 813) which was restricted to a denial, to members of insurance companies, of the right to have entered by a court, in a suit by them instituted, an order, judgment or decree enjoining, restraining or interfering with the prosecution of the business of their company. The Supreme Court of Illinois by the decision, of which review is here sought, itself extended the scope of that enactment to a prohibition of the *maintenance* of a derivative action by a member of an insurance company, brought for the benefit of that company and against its officers and directors, which decision, in itself, is an exercise of police power by the Court. As will be hereinafter more fully pointed out, such enlargement of the statutory prohibition leaves the Company and its members without a remedy to obtain relief from an inequitable and unconscionable contract with its directors, for the legislature has not granted, nor does any other effective remedy to redress such wrong exist. The Illinois Supreme Court's decision is, therefore, a taking of property without due process in violation of the Fourteenth Amendment. *Gibbes* v. *Zimmerman*, 290 U. S. 326, 332. *Hardward Dealers Mutual Fire Ins. Co.* v. *Glidden*, 284 U. S. 151, 158.

The public policy of other states with respect to actions involving insurance companies is not here involved. The public policy of Illinois is disclosed by the provisions of Section 201 itself. It is further disclosed by the fact that the legislature of Illinois in 1937 narrowed the prohibitions contained in that Section, by eliminating therefrom the prohibition against suits for an accounting (1935 Ill. Rev. Stats. Cha. 73, par. 105 (8) (a)). But if the decisions of other states were relevant, not a single one of those cited by respondents is applicable here, for in every case cited the relief there sought was of a nature which would have prohibited the insurance company there involved from the future conduct of its business or to require an

accounting by the company itself to its policyholders. The relief prayed in petitioner Petersen's suit would in no way prohibit the future conduct of the company's business and was for an accounting to the company by its officers and directors.

The case of *Swan* v. *Mutual Reserve Fund Life Ins. Asso.*, 155 N. Y. 9, 49 N. E. 258, was a suit for an accounting by an insurance company to its members, and was within the precise language of the statute, there involved, forbidding such an action. In Illinois, by virtue of the 1937 amendment, such a suit would be permitted.

In *Lowry* v. *State Life Ins. Co.*, 153 Ind. 101, 54 N. E. 442; *Oklahoma Benefit Life Asso.* v. *Bird*, 135 Pac. 2nd 994; *McGarry* v. *Lentz*, 13 Fed. 2nd 51; *Cook* v. *Illinois Bankers Life Asso.*, 46 Fed. 2nd 782, injunctive relief was sought against the respective defendant companies which would have prohibited them from the future conduct of their business.

In *Delaney* v. *Ancient Order of United Workmen*, 244 Mass. 556, 138 N. E. 918, both an injunction against, and a receiver for the corporation were sought, while in *Baird* v. *Modern Samaritan*, 162 Minn. 274, 202 N. W. 498, the suit was likewise against the corporation, not for its benefit, and the holding in that case, as well as the holding in the *Oklahoma Benefit Life Association* case were precisely to the contrary of the holding of the Illinois Supreme Court in the case, involving almost identical questions, of *Dale* v. *Hancock County Mutual Life Asso.*, 363 Ill. 222.

C.

Petitioner Petersen and the Respondent Insurance Company Have Been Deprived of All Remedies.

Respondents have set out, in great detail, the provisions of the Illinois Insurance Code concerning the powers of the Director of Insurance. They have failed to discover one, for none exists, which affords the Director of Insurance any right or power to require the officers and directors of this Association to account to it for the unconscionable sums received by them.

This Association's directors have been exceedingly clever in their attempt to avoid the statutory prohibition against an officer or director of an insurance company, who receives more than $200.00 a month, receiving any other compensation, directly or indirectly (1935 Ill. Rev. Stats. Cha. 73, par. 382) (originally enacted 1907). The subterfuge adopted was of having the Agency contract provide that the Agency pay the salaries of the Association's President and First and Second Vice Presidents (R. 11) thus hoping to escape the letter, if not the intent of that statute, on the theory that those officers were not receiving any compensation *from the Association itself.*

In 1937 the Insurance Code was enacted by the Illinois legislature and there was, for the first time, granted to the Director of Insurance, the power to examine the books, records and documents of any person having a contract, written or oral, pertaining to the management or control of a company as *exclusive* general agent (1943 Ill. Rev. Stats. Cha. 73, par. 132 (d)). Thereupon, in July 1938, this Association's directors amended the, theretofore, exclusive Agency contract by eliminating from that agreement the provisions designating the Agency as the Association's *exclusive* agent (R. 12) although its members continued to be, in fact, the sole recipients of the 20% of

net premiums (R. 12). The only possible purpose of this contract amendment was to avoid the letter of the Insurance Code in an attempt to deny the Director of Insurance, if he should seek to exercise it, the right to examine the Agency's records, on the theory that no *exclusive* agency contract exists.

Respondents contend (Brief, p. 18) that one of the grounds, upon which the Director of Insurance is authorized to act, is the violation of any law of the State and from that it is argued that if any law were violated by the individual respondents here the members were afforded a remedy by action of the Director of Insurance. The answer to that contention is threefold. First, as above pointed out, these individual respondents have taken every means to avoid a violation of the letter of any law which might empower the Director to act. Second, there is no statute prohibiting an unconscionable contract between the Association and its directors and third, that where, as here, the Director of Insurance has failed to act since 1927 (R. 4) no method or procedure is provided the members by the Insurance Code or otherwise, by which the Director can be required to take action.

Sections 401, 402 and 403 of the Insurance Code (1943 Ill. Rev. Stats. Cha. 73, par. 1013, 1014, 1015) confer upon the Director the power to make rules and regulations, to conduct examinations and investigations and hold hearings and Section 407 (1943 Ill. Rev. Stats. Cha. 73, par. 1019) provides for court review of an order or decision made by the Director. Nowhere is there provided a court proceeding in case of non-action of the Director in failing to exercise the powers conferred upon him.

Therefore, the effect of the Illinois Supreme Court's decision is to render the members of this Association without any remedy for the individual respondents' wrongs, for no statutory remedy is available, either in

their own right or through the Director of Insurance and the remedy of mandamus against the Director of Insurance, to require him to act for their benefit, is not available for the reasons stated in petitioner's Brief, pages 26 and 27 and those herein stated.

CONCLUSION.

For the reasons heretofore indicated we respectfully submit that the petition for certiorari be allowed and the decision of the Supreme Court of Illinois be reviewed by this honorable Court.

Respectfully submitted,

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